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Supreme Court of the United States

OCTOBER TERM, 1950

No. 407

FARMERS' UNION EDUCATIONAL AND COOPERATIVE ASSOCIATION OF SOUTH DAKOTA, AND JUNIOR CHAMBER OF COMMERCE OF MITCHELL, *Petitioners,*

vs.

NORTHWESTERN BELL TELEPHONE COMPANY, *Respondent.*

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

Preliminary Statement

The purpose of this reply brief is limited to answering procedural objections raised by the respondent in its answer to the petition for Writ of Certiorari. In its brief (pp. 8-11), respondent asserts that the petitioners lack standing to seek certiorari because of their failure to assign or brief error in the South Dakota Supreme Court, and (pp. 11-15) that no federal question was involved in the State Court proceedings, from which they argue that this Court is without authority to review the judgment. It is to these two points that this reply is directed.

Respondent also challenges the factual basis of the order of the Public Utilities Commission of South Dakota which denied respondent an increase of existing telephone rates within the State. It is not petitioners' purpose here to reiterate the discussion of the evidentiary basis for the Commission's order nor for the items of cost and expense which the Commission rejected in reaching its conclusion. As has been shown in the Petition for Writ of Certiorari, each of the Commission's findings was in fact supported by evidence. Although it is true, as respondent asserts, that the trial Court reached different conclusions on the conflicting evidence, that fact is immaterial here, since the trial Court had no authority to re-examine or re-weigh the evidence. The Commission's findings are conclusive unless they are unsupported by evidence. *Application of Dakota Transportation Co.*, 67 S. D. 221, 231, 232, 291 N. W. 589, 594. In attacking the findings of the Commission, the respondent assumed the burden of clearly establishing that the order resulted in the confiscation of its property. *Railroad Commission* v. *Pacific Gas Co.*, 302 U. S. 388, 397.

As has been demonstrated in the petition for Writ of Certiorari, each finding of fact made by the Commission was supported by the evidence or by the failure of the respondent to adduce evidence to support its application. The burden of proof was, throughout these proceedings, upon respondent to support its application with evidence satisfactory to the Commission.[1] The Commission, of

[1] §52.0216, South Dakota Code, provides: ". . . At any hearing, involving an increase in rates, fares, or charges for transportation of passengers, property, express, or messages by telegraph or telephone, the burden of proof to show that the increased rate or proposed rate is just and reasonable shall be upon the common carrier, and the Commission shall give preference to the hearing and determination of such question and shall decide the same as soon as possible."

course, had the right to weigh the respondent's evidence and reject it if it were conjectural or unsatisfactory. *Railroad Commission* v. *Pacific Gas Co.*, 302 U. S. 388, 397. Since the Commission's findings were a fair and reasonable attempt to weigh the evidence, and their conclusions might have been reached by any fair-minded board, their findings of fact should be sustained by this Court. *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 16.

In view of the factual situation before the Court, we turn to a discussion of the respondent's asserted reasons for denial of review in this Court. An examination of the basic principles on which the respondent itself founded its attack on the Commission's order will demonstrate that the case is clearly one involving substantial federal questions and that it may properly be reviewed by this Court.

I. The Judgment of the Supreme Court of South Dakota Depended Upon the Determination of a Federal Question, Since the Respondent's Claim for Relief Was Founded Upon an Assertion that the Commission's Order Deprived the Respondent of Property Without Due Process of Law, and Without Such a Claim, Respondent Would Have Had no Standing to Complain of the Commission's Order.

In this case, the respondent argues that the Supreme Court of South Dakota considered only the question of whether or not the order of the Commission was supported by substantial evidence, and hence, the respondent argues, there was no question of respondent's rights under the Constitution of the United States which was involved in those proceedings.

The naivete of such an argument becomes obvious when the foundations upon which the respondent itself based its claim for judicial relief are examined. The gist of

the application for judicial review of the Commission's proceedings was that the order violated Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 2, Article VI, of the Constitution of South Dakota [Record, p. 136]. Furthermore, there was no other legal basis upon which respondent's claim for relief could have been founded.

Fundamentally, the establishment of public utility rates is a legislative one. *Application of Northwestern Bell Telephone Co.*, 69 S. D. 36, 45, 6 N. W. 2d 165, 170; *St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38, 50, *Los Angeles Gas Co.* v. *Railroad Commission*, 289 U. S. 287, 304, 305. In South Dakota, this legislative function of determining rates has been committed to the Public Utilities Commission, and the discretion of the Commission is unlimited by the terms of the statute.[2] This legislative grant of regulatory power is restricted only by the constitutional limitation that the utility cannot be deprived of its property without due process of law by the establishment of rates which are confiscatory. An examination of the case in which the South Dakota Supreme Court established this limitation demonstrates that this limitation on the power of the Commission is derived from the due process clause of the Fourteenth Amendment to the United States Constitution. *Application of Northwestern Bell Telephone Company*, 69 S. D. 36, 6 N. W. 2d 165.

The issue of whether or not the Commission exceeded its constitutionally limited authority was, therefore, clear-

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[2] §53.1302, South Dakota Code, provides, ". . . Such commission shall have power to fix individual rates as well as to make schedules of maximum rates, including joint rates to be charged by any telegraph or telephone company or companies for the rent of any line or instrument or for the transmission of any messages and for any service in connection therewith, and to make such changes therein from time to time as it may deem reasonable or necessary, and it may exercise any other power necessary to a proper supervision and control of such companies.

ly the issue upon which the determination of the judicial proceedings depended. That issue was necessarily interjected by the respondent itself, because unless it could successfully demonstrate an invasion of its constitutional rights, it could not obtain relief. The petitioners' case rests upon the fact that the Public Utilities Commission was legally empowered to fix rates which it deemed to be just and reasonable, and that it did so by denying the respondent's application for an increase. Consequently, the question of the constitutional rights of the respondent has been the single issue in these proceedings from the very instant that Northwestern Bell Telephone Company filed its application for review in the Circuit Court, and that issue has not, nor could it be, eliminated from these proceedings. Respondent's position that there is no constitutional question can be sustained only by ignoring, as respondent's brief does, the fundamental principles upon which its own claim for relief is necessarily founded.

II. Petitioners Did Not Waive Their Standing in This Court by Failing to File Assignments of Error in the South Dakota Supreme Court.

Respondent also attacks the standing of the petitioners to seek review in this Court of the determination of the federal question which, as has been shown, was necessarily determined by the Supreme Court of South Dakota. The basis of this attack is the assertion that the petitioners waived their position by reason of the fact that they did not file assignments of error in the State Court. At the outset, the tenuous nature of this objection is readily apparent when it is considered that the question is one purely of technical appellate procedure in the State Court, and the respondent has not previously raised this objection. The State Court recognized the petitioners as parties before it, heard their arguments, and determined the cause on the merits [Record, p. 202].

In all of the cases which the respondent cites in its brief, the State Court determined the matters not upon the merits, but upon preliminary motions to dismiss the appeals as not properly perfected.

More important than these considerations, however, is the fact that all of these cases were decided under the general appeals procedure in South Dakota, and the statute (§§33.0735, 33.0743, South Dakota Code) upon which respondent relies is the general statute governing appellate procedure. The cases cited are not in point, nor is the cited statute governing, because this appeal was taken, not under the general statute, but under the statute specifically governing appeals in public utilities cases, which does not require the filing of assignments of error, but, on the contrary, makes the case reviewable upon the entire record before the Public Utilities Commission.[3] The appeal remedy provided by this special statute is an exclusive one. §52.0506, South Dakota Code. Since the petitioners fully complied with the provisions of the spe-

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[3] §52.0505, South Dakota Code: "From any final order, judgment, or determination, made by any Circuit Court on such appeal [from the Commission], any party affected thereby, including the state of South Dakota or the Public Utilities Commission of the state of South Dakota, shall have the right to appeal to the Supreme Court of this State. Said appeal to the Supreme Court must be taken within thirty days after the entry of the judgment, order, or determination by the Circuit Court by serving a notice of appeal to the Supreme Court upon all parties to said proceeding in the Circuit Court and by filing within said time said notice of appeal with the Clerk of the Supreme Court and the clerk of the Circuit Court. The clerk of the Circuit Court on filing of said notice shall immediately forward to the Clerk of the Supreme Court the entire record in said case, which record shall constitute the settled record, and the Supreme Court, either upon application of any party or on its own motion, shall fix the time for serving and filing of briefs by the parties entitled to be heard on said appeal as in its opinion the necessities of the case require and to make any special order necessary to be observed by the parties for the prompt and speedy hearing and determination of said cause.

cial and governing statute, their standing before the South Dakota Court can not be challenged by the respondent.

This question of state procedure is important here only if the State Court had no opportunity to determine the federal question. As has been pointed out, that federal issue was clearly and specifically before the State Court, which founded its judgment upon the determination of that issue. The federal question was raised by the respondent itself, and at every stage of the proceedings was the basis of the determination of the case. This Court has the authority and the duty to review the State Court's conclusions as to federal law.

Conclusion

Since the constitutional issue was the foundation of the State Court's judgment, and since, as petitioners have demonstrated in their petition for Writ of Certiorari, that issue is a substantial one which the State Court has decided in a way probably at variance with the decisions of this Court, we respectfully submit that the Writ of Certiorari should be granted.

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